

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 20, 2005

MICHAEL WAYNE PERRY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Wilson County
No. 97-1173, 97-1173A J.O. Bond, Judge

No. M2005-01669-CCA-R3-PC - Filed March 17, 2006

The petitioner, Michael Wayne Perry, appeals from the denial of his petition for post-conviction relief. On appeal, he alleges both prosecutorial misconduct and ineffective assistance of counsel arising from the failure of the prosecutor and trial counsel to correct numerous instances of false testimony during his suppression hearing and at trial. Following our review of the record and the parties' briefs, we affirm the judgment of the post-conviction court denying post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Harry A. Christensen, "Elbow" Counsel, Lebanon, Tennessee and Michael Wayne Perry, Petrose, Tennessee, *Pro Se*.

Paul G. Summers, Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background and Procedural History

The petitioner was convicted by jury of second degree murder and first degree felony murder. After merger of the two convictions, the petitioner received a sentence of life without parole. On direct appeal, this court affirmed the petitioner's convictions and sentence. *See State v. Michael Wayne Perry*, No. M1999-01832-CCA-R3-CD, 2001 WL 334302 (Tenn. Crim. App., at Nashville, April 6, 2001). The following is a recitation of the convicting evidence set forth in this court's opinion on direct appeal:

On the evening of April 8, 1997, at approximately 11:00 p.m., twenty-four-year-old Michael Wayne Perry, the defendant, was seen leaving the Cactus Moon Bar in Lebanon, Tennessee, with the victim, thirty-two-year-old Cynthia Louise Hamilton Boyle, in a Chevrolet Blazer driven by Defendant and owned by Defendant's father-in-law. The victim's naked and battered body, with a visible tire track across the right shoulder, was found the next morning at the golf course of the Lebanon Country Club. The autopsy showed that she had suffered multiple injuries, including the fracture of all twelve ribs on the left side of her body, multiple perforations of the lungs, fractures of the left arm and leg, a subdural hematoma, and various abrasions and contusions of the face and body. Four of her teeth had been knocked out. A severe laceration to her left ear was consistent with the victim having been struck by a hard object. Abrasions on her face and body indicated that she was not only run over by a vehicle, but also dragged beneath it for some distance.

On April 15, 1997, Defendant was arrested and taken to the Lebanon Police Department for questioning. At approximately 7:04 p.m., Lebanon Police Detective Tommy Burns read Defendant his rights, and Defendant signed a waiver of rights form. Detective Burns was then joined by Lebanon Police Detective Bob Harrison, and they questioned Defendant about his activities on the night of the murder. Approximately forty-five minutes into the interview, when the detectives asked about his son's schoolwork that had been found at the murder scene, Defendant said, "I have no more further, I have nothing further to say. Y'all [sic] got something on me, I want to get me a lawyer. But there's nothing on me 'cause I can prove my son does not write or nothing. My son can't write; he can't even talk." (A dispute later arose between Defendant and the State concerning the actual language used by Defendant. After listening to the tape of the interview, the trial court ruled that Defendant made the statement quoted above.) The detectives continued questioning Defendant for another nine minutes, concluding the interview at 8:00 p.m.

Detectives Burns and Harrison interviewed Defendant once more that same evening, from 9:02 p.m. until 9:44 p.m., and again the next day, from 3:00 p.m. until 3:39 p.m. Defendant was informed of his rights at the beginning of each interview and signed another waiver of rights form before the third interview commenced. During the third interview, Defendant admitted leaving the bar with the victim. He further stated that he and the victim had been driving around in his father-in-law's Blazer when, suddenly, the victim started "going off in the head." She hit him several times with her hand before jumping out of the truck and falling under its wheels. He stopped and picked her up, put her back in the truck, and then dumped her body on the golf course. Defendant said that he did not remember whether or not he had raped her, but that he "might have" beaten the victim and it was "possible" that he had been trying to have sex with her. About one hour after the conclusion of the interview, at 4:50 p.m. on April 16, 1997, Defendant was served with a warrant charging him with first degree murder for the death of the victim.

According to Detective Burns, the next morning, April 17, 1997, Defendant asked to talk with him again. When Burns met with Defendant in an interview room of the jail, Defendant asked to be left alone with a tape recorder in order to make a statement. Burns read Defendant his rights, and Defendant signed another waiver of rights form. Burns then left the room, and Defendant recorded a statement in which he confessed to killing the victim after she refused his request for sexual intercourse. Defendant said that the victim's refusal had made him "frustrated, real frustrated," and that "all evil inside or something came out." He admitted beating the victim "bad," before throwing her out of his truck and deliberately running her over. He also stated that, before he threw the victim out of the truck, he "did stuff" to her and thought he had raped her.

Perry, 2001 WL 334302 at *1-2.

On July 26, 2002, the petitioner filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel to represent the petitioner, and counsel filed an amended petition, alleging prosecutorial misconduct, ineffective assistance of counsel, an inappropriate burden of proof standard, and other matters previously raised in the petitioner's direct appeal. At the initial hearing, the post-conviction court dismissed the petitioner's petition after the petitioner sought removal of his counsel and requested a continuance to amend his petition. This court reversed the dismissal and remanded for further proceedings. *See Michael Wayne Perry v. State*, No. M2003-02510-CCA-R3-PC, 2004 WL 1908810 (Tenn. Crim. App., at Nashville, August 25, 2004). Thereafter, the petitioner amended his petition and a hearing was held.

At the hearing, the petitioner argued that prosecutorial misconduct occurred when the prosecutor failed to correct the false testimony of state witnesses. Specifically, the petitioner claimed that a close scrutiny and comparison of the suppression hearing and trial transcripts would show that the variations and inconsistencies in the witnesses' testimony constituted false testimony. The petitioner also argued that his defense counsel was ineffective because counsel failed to impeach this false testimony at trial and failed to raise these testimonial issues on direct appeal. On cross-examination, however, the petitioner acknowledged that most of the alleged discrepancies in the witnesses' testimony were brought out in the cross-examination of the witnesses by his defense counsel. Also, when asked what were the objections that defense counsel failed to make, the petitioner responded with the following vague statement:

At trial several witnesses' testimony became questionable [which] opened the door for impeachment. . . . Like I said, the record clearly shows false testimony by the witnesses, by the detectives, by might near everybody involved. Defense counsel failed to impeach any of this false testimony produced on July 27th, 1999 at trial, and July 12th during the suppression hearing.

The petitioner's co-counsel testified that the petitioner's case was thoroughly investigated and the defense was prepared for trial. According to co-counsel, independent experts were hired to

examine the DNA evidence found at the crime scene, numerous motions were filed including motions to suppress the petitioner's statements, an extraordinary appeal was filed, all material witnesses were interviewed, experts were consulted, and witnesses were cross-examined at trial. Also, an investigator from the public defender's office testified that he personally interviewed all state witnesses and anyone else the petitioner requested he interview. The investigator recounted that he helped to coordinate the independent testing of the DNA evidence.

After hearing the petitioner's claims, the post-conviction court denied post-conviction relief, stating the following:

Well, I've listened to what's been presented here and I remember the case. . . I don't know of anything in that trial . . . that went bad. It all went according to procedure.

[Defense counsel] is a good lawyer, and I think from what's been stated here that he did a good job on this case. When you're facing confessions and this type [of] thing and there was one in this case, a recorded one, chances of victory sometimes [are] not as strong

You know, this case has been through a trial court, went through an appellate court that has three appellate judges, each one read the entire record . . . then made a decision on it and all three of them agreed that it was a good judgment. And should not be reversed.

. . . [T]here's no proof here today that anybody lied at all. May be some variances of what one witness said as opposed to another, but we had twelve good men and women true who made a decision when they heard all [the testimony], they listened to every bit of that. And they made a decision that you were guilty beyond a reasonable doubt. . . .

The Court doesn't see anything here that would give rise to changing this verdict. . . . Post trial conviction [relief] is denied.

II. Analysis

On appeal, the petitioner challenges the post-conviction court's denial of post-conviction relief, alleging both prosecutorial misconduct and ineffective assistance of trial counsel arising from the failure of the prosecutor and trial counsel to correct numerous instances of false testimony during his suppression hearing and at trial. In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual

findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

Upon review, we note that the petitioner's post-conviction arguments amount to a thinly veiled attempt to relitigate the sufficiency of the evidence previously addressed by this court on direct appeal. His entire argument is comprised of eight purported "false statements" made by witnesses before and during his trial. Significantly, this court has previously determined that allegations that the prosecution used false or perjured testimony in order to obtain a conviction is tantamount to a challenge to the sufficiency of the evidence. *See Gant v. State*, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973). Accordingly, this court concluded that issues relating to the sufficiency of trial evidence and the competency and credibility of witness testimony presented at trial are not cognizable in a post-conviction proceeding. *Id.* Also, it is well-established that post-conviction proceedings may not be employed to raise and relitigate issues previously determined on direct appeal. *See, e.g., Miller v. State*, 54 S.W.3d 743, 747-48 (Tenn. 2001); *Long v. State*, 510 S.W.2d 83 (Tenn. Crim. App. 1974). An issue has been previously determined when a court of competent jurisdiction has ruled on the issue's merits after a full and fair hearing. *See* Tenn. Code Ann. § 40-30-106(h). In the instant case, this court reviewed the petitioner's allegations concerning the sufficiency of the evidence and the credibility of the witnesses on direct appeal and rejected them at that time. Therefore, it is unquestionable that the petitioner's issues have been previously determined and are not subject to further review by this court.

Additionally, a review of the record before us reveals that the petitioner failed to prove his bare allegations of prosecutorial misconduct and ineffective assistance of counsel. To establish ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). To prove prosecutorial misconduct, the petitioner must show that the conduct was so improper that it materially prejudiced the verdict. *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); *see also State v. Spurlock*, 874 S.W.2d 602, 621 (Tenn. Crim. App. 1993) (stating that although the prosecution has an affirmative duty to correct false testimony, the testimony must be material to the accused's guilt to entitle the accused to a new trial). In this case, there is no evidence in the record that the petitioner's trial was prejudiced by deficient representation of counsel or prosecutorial misconduct.¹ Consequently, it is clear that the petitioner failed to prove his allegations by clear and convincing evidence, and the post-conviction court was correct in denying post-conviction relief.

III. Conclusion

For the reasons articulated, we affirm the denial of post-conviction relief.

¹ The petitioner failed to include the trial transcript in the record for our review.

J.C. McLIN, JUDGE